143 (3)

No. 09-341

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTHONY D'ARIA,

Petitioner,

v.

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-and-

UBS FINANCIAL SERVICES, INC., a corporation, UBS PAINE WEBBER, a corporation, PAINE WEBBER GROUP, INC., a corporation,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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Respondent UBS fails to contest the reasons advanced by Petitioner Anthony D'Aria in support of his petition for certiorari. Instead, UBS asserts two procedural barriers to review that are without merit.

First, contrary to UBS's argument, D'Aria does not seek an advisory opinion. D'Aria's petition seeks to overturn the entire proposed settlement. The question posed is whether the proposed settlement's reversionary fee structure, which has been condemned by legal scholars as a *per se* breach of class counsel's ethical and fiduciary duties to the class, demonstrates both that absent class members were inadequately represented and that the proposed settlement is unfair and inadequate under Rule 23. Contrary to UBS's misguided argument, the question is not where the money would go if the attorneys' fees were slashed.

Second, D'Aria's procedural standing to challenge the proposed settlement comes into question solely because of a perfunctory and inaccurate timeliness analysis in the courts below which ignored blatant manipulation of the settlement approval process by UBS (which UBS attempts to obscure with unsworn and unattributed facts absent from the record below). In the settlement approval process under Rule 23, courts have a fiduciary obligation to safeguard the interests of absent class members. If there is merit in D'Aria's contention that the proposed settlement inherently violates the due process rights of absent class members, then by definition, the courts below failed adequately to protect absent class members' interests when they allowed highly artificial timeliness considerations to deprive D'Aria of procedural status to challenge the settlement.

I. D'Aria Challenges the Entire Proposed Settlement on the Basis of Its Reversionary Fee Structure, Not Merely the Structure's Effect if Attorneys' Fees Were Reduced.

UBS is disingenuous in suggesting that D'Aria seeks an "advisory opinion" on the attorney's fee provision which will not affect the rights of the litigants. The gravamen of D'Aria's petition is that the proposed settlement's reversionary fee structure poisons the entire settlement:

> [A] class action settlement shaped by the ethical conflicts, perverse incentives and procedural distortions of a reversionary fee structure *ipso facto* is not "fair, reasonable and adequate" under Rule 23(e)(2) and should not be approved. . . . [A] reversionary fee structure [also] renders adequate representation under Rule 23(a)(4) impossible, and poses an insurmountable obstacle to settlement-only class certification antecedent to settlement approval.

Pet. Br. 11.

A reversionary fee structure causes *immediate* harm to absent class members' interests, *i.e.*, inadequate representation, and an unfair and inadequate settlement. The damaging consequences of the structure that D'Aria identifies had their effect on the proposed settlement long before the district court was ever called on to consider the proposed attorney's fees. The proposed settlement was shaped by the breaches of class counsel's duties that arise from

payment by an adversary (Pet. Br. 12-13), and by multiple perverse incentives and opportunities to trade class interests for the interests of the plaintiff's counsel and defendants who negotiated it (Pet. Br. 14-16); simply by adopting the reversionary fee structure, class counsel imposed an unjustifiable economic loss on the class (Pet. Br. 16-17); and both objection and judicial review for the benefit of absent class members were inhibited during the settlement approval process (Pet. Br. 17-19)—all irrespective of whether the district court ever actually invoked the reversionary fee provision (indeed, the district court was predictably dissuaded from doing so). Thus, the effects of the reversionary fee structure identified by D'Aria do not concern "a hypothetical state of facts," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) as UBS contends, but are concrete reasons to reject the proposed settlement in its entirety.

For the same reasons, UBS's strained analogy of D'Aria's claims to a non-justiciable "subjective chill" of First Amendment rights, *Laird v. Tatum*, 408 U.S. 1 (1972), is inapposite. No credence should be given UBS's unstated implication that the settlement's structural features challenged by D'Aria are a mere technicality in a proposed settlement that otherwise deserves approval. While D'Aria's petition focuses on the reversionary fee structure because it is the central legal issue raised by the settlement, his wider argument in the courts below identified numerous other, concrete and troubling features of the settlement which are closely related to the conflicts and perverse incentives associated with a reversionary fee structure. Thus, D'Aria alleged in the courts below that:

— The proposed settlement followed a *de minimus* investigation by counsel and 16-page boilerplate complaint, with no adversarial motion practice, discovery, or litigation whatsoever. Class counsel reached a "quickie" settlement in less than four months before UBS even answered any of the underlying complaints that were consolidated solely for purposes of settlement.

— The action's history, intertwined with the settlement of an earlier, related California case, *Bowman v. UBS Financial Services*, Case No. C-04-03525 MMC, suggested a nationwide (ex-California) settlement was collusively pre-packaged without any intention of adversarial litigation.

— Class counsel relied on UBS's data and expert analysis of damages without expert assistance for the class, and settled for what D'Aria calculated (in the only written estimate ever provided to the court) to be 4 or 5 cents on the dollar of claimed losses.

— The legal fees of $11,250,000 for plaintiff's counsel were exorbitant in relation to the negligible prosecution of the action; the district court speculated that the fees represented a lodestar multiplier of at least ten, and the parties did not contradict D'Aria's estimate that the multiplier was over forty.

— The notice to class members failed adequately to disclose the settlement's reversionary structure, both as to legal fees and as to the overall value of the settlement to class members.

Cf. Pet. Br. 7-8.

II. If There Is Merit in D'Aria's Argument that the Proposed Settlement's Reversionary Fee Structure Inherently Violates the Rights of Absent Class Members, Then the Courts Below Necessarily Erred When They Failed to Grant D'Aria Status as Either an Objector or an Intervenor.

1. Starting months before the final approval hearing on the proposed settlement, D'Aria made several applications to challenge the settlement as both an objector and as an intervenor-plaintiff. Either status provides standing to appeal the proposed settlement. The district court and the court of appeals, however, failed to admit D'Aria as either an objector or an intervenor, and thereby avoided any consideration of the merits of his contentions on procedural grounds.

Both with respect to objection and intervention, the procedural barriers erected against D'Aria in the courts below rest on a wholly artificial calculation of his timeliness, as explained below. If D'Aria's contentions concerning the interests of absent class members have any merit, it also follows that the district court abused its discretion (and the Ninth Circuit erred in affirming) when it allowed such a timeliness analysis to deprive

him of any status to challenge the settlement on absent class members' behalf. The rights of absent class members are a principal concern of the settlement approval process established by Rule 23(e), and courts have a fiduciary obligation to safeguard them. *See* Pet. Br. 10-11 (citing cases). The participation of both objectors and intervenors is favored in the settlement approval process because their presence adds an adversarial voice concerning the proposed settlement that serves this purpose. *See, e.g., Vollmer v. Selden*, 530 F.3d 656, 660 (7th Cir. 2003) (intervenors counter-act collusive incentives at settlement stage), *In re General Motors Corp.*, 55 F.3d 768, 803 (3rd Cir. 1995) (objectors valued to provide independently-derived information about settlement merits).

In practical terms, the procedural timeliness issue raised by UBS is ancillary to the merits of D'Aria's substantive challenge to the settlement and certainly does not stand in the way of this Court granting certiorari.

2. A summary timeline of the events concerning D'Aria's timeliness that are discussed below is as follows:

September 22, 2006:

> Lawrence Kaufmann, represented by Lovell Stewart Halebian LLP ("LSH"), counsel to D'Aria here, submits an objection in the related case, *Bowman v. UBS Financial Services*, in which he announces his intention to file a parallel objection in the instant action.

Late September 2006:

UBS contacts Kaufmann behind the back of LSH about withdrawing his *Bowman* objection in exchange for forgiveness of a $102,000 debt to UBS.[1]

October 13, 2006:

Kaufmann files motions through LSH to intervene in both actions.

November 7, 2006:

UBS and Kaufmann secretly reach a formal agreement for Kaufmann's withdrawal from both actions in exchange for forgiveness of his $102,000 debt.

November 14, 2006:

The deadline to file objections in the instant *Glass* action. UBS files notice late in the evening disclosing Kaufmann's withdrawal from both actions (Reply App. B).

November 16, 2006:

More than two months before the final approval hearing in the instant action, D'Aria, represented by Kaufmann's former class action counsel LSH, applies to substitute for Kaufmann as objector and proposed intervenor-plaintiff (Resp. App. D). The district court denies his application the same day before even receiving a response from UBS or class counsel (Pet. App. D).

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1. *See* Reply App. A, ¶2. The district court, however, sustained a hearsay objection by UBS to this evidence. Resp. App. 6a, fn.

December 1, 2006:

D'Aria files a brief urging the court to preserve Kaufmann's objections in the instant action until D'Aria is able to reassert them.

December 15, 2006:

More than a month prior to the final approval hearing, D'Aria files his own motion to intervene in the instant action.

January 17, 2007:

The district court strikes D'Aria's brief on Kaufmann's objections and permits Kaufmann to withdraw them (Resp. App. A). The court simultaneously denies D'Aria's motion to intervene (Pet. App. C).

January 19, 2007:

Final approval hearing on the proposed settlement.

Cf. Pet. Br. 8, Resp. Br. 3-4.

3. D'Aria originally applied to substitute for objector and proposed intervenor Kaufmann on the morning of November 16, 2006, instead of on November 14—the deadline to object, when UBS first disclosed Kaufmann's withdrawal from the litigation. No practical difficulties whatsoever were posed by the timing of D'Aria's application. D'Aria sought to pursue arguments against the proposed settlement that had already been fully and timely asserted and briefed during the preceding months (by the same counsel) on behalf of Kaufmann. Moreover, D'Aria's application came more

than two months before the final approval hearing on the proposed settlement, scheduled for January 19, 2007.

D'Aria's purported untimeliness results solely from UBS's belated disclosure of Kaufmann's withdrawal on the very evening of the deadline to object. Given the swiftness of D'Aria's initial application to substitute for Kaufmann after that disclosure, there is no doubt that if Kaufmann's withdrawal had been disclosed even a single day earlier, D'Aria would have met the deadline and been able to challenge the proposed settlement (at the very least as an objector) without procedural difficulty. These circumstances strongly suggest that UBS exploited its private leverage against Kaufmann not merely to induce him to withdraw, but also to hide his abandonment of class interests from his own class action counsel while UBS strategically timed his exit to hinder entry of any substitute to speak on behalf of absent class members, such as D'Aria. Kaufmann never disclosed to his own class action counsel that he was negotiating with UBS to sell out class interests for private gain, even after he and UBS reached a formal agreement on November 7, 2006.[2] Apart from being rife with probable legal and ethical impropriety,[3] such a

2. The papers disclosing Kaufmann's withdrawal were filed by UBS, an adverse party. UBS's contrary statement (at Resp. Br. 4) that "*Kaufmann* filed notice of the settlement in the district court and asked the court to withdraw" (emph. added) is false. *See* Reply App. B.

3. D'Aria argued that UBS's deal with Kaufmann amounted under New Jersey law to commercial bribery of Kaufmann to breach his fiduciary duty to class members as a proposed class representative. Resp. App. 17a.

stratagem by UBS directly undermines the process established by Rule 23 to protect absent class members.

As it did in the Ninth Circuit, UBS presents to this Court unsworn and unattributed statements that were never presented to the district court, suggesting that Kaufmann initiated his withdrawal from the litigation.[4] *See* Resp. Br. 3. To the contrary, sworn testimony from Kaufmann's co-counsel in the class action indicated that UBS contacted Kaufmann days after he filed his initial objection in the related case in September, 2006.[5] Reply App. A, ¶2. The bare-bones information that UBS made available to the court (nearly identical declarations by Kaufmann and the attorneys who negotiated his private settlement with UBS, attached to UBS's notice disclosing his withdrawal) artfully omit to state when negotiations of his withdrawal began, reciting only that an agreement was reached on November 7, 2006. Reply App. B. The record on appeal remains effectively incomplete because the district court failed to press UBS for any further clarification of these events.

4. UBS implausibly argues that Kaufmann's withdrawal has no bearing on determining whether

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4. Specifically, nothing in the record below supports UBS's statements that "UBS had been preparing to sue Lawrence Kaufmann [and] Kaufmann, in turn, was preparing a cross-complaint alleging (among other things) wrongful discharge," or that "Kaufmann's counsel, George Mahr III, then approached UBS. . . ." Resp. Br. 3; *cf.* Reply Apps. A and B (the information actually available to the district court).

5. The court sustained UBS's objection to this evidence as hearsay. Resp. App. 6a, fn.

D'Aria's motions to substitute for Kaufmann and to intervene were timely. Resp. Br. 9; *cf.* Pet. App. 65a-66a (district court holding that D'Aria failed to show reliance on Kaufmann). Long before D'Aria came forward to adopt Kaufmann's objections to the proposed settlement as his own, however, D'Aria was not only aware of the objections, but actually provided assistance and information to Kaufmann's class action counsel to prosecute them during September and October 2006 when they were being formulated and briefed to the court. Resp. App. 8a (D'Aria declaration).

D'Aria's obligation to move for intervention is properly measured not from when he learned merely that his interests were at stake in the litigation, but from when he learned that his interests were no longer represented by the existing parties to the litigation. *San Jose Mercury News, Inc. v. U.S. Dist. Court - Northern Dist. (San Jose)*, 187 F.3d 1096, 1101 (9th Cir. 1999) (In measuring delay in seeking intervention, the inquiry looks to when the intervenor became aware its interests would no longer be adequately protected by the parties). As a proposed intervenor and class representative, Kaufmann expressly sought to represent other absent class members—surely not least among them D'Aria, who personally assisted Kaufmann's motions and objections. Moreover, as an objector, Kaufmann was a party to the action. *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Hence, there was no reason, and no legal requirement, why D'Aria himself needed to duplicate Kaufmann's objections and motions. D'Aria only learned Kaufmann had traded the interests of other absent class members for a private deal when UBS disclosed Kaufmann's withdrawal, whereupon D'Aria immediately—and timely—acted to take up Kaufmann's

abandoned role. The district court thus clearly erred in denying intervention on timeliness grounds.

5. For similar reasons, assuming that DAria's contentions are meritorious, he should also have been granted the status of an objector. In the class action settlement approval process, courts may and regularly do consider the merits of procedurally defective objections. *See, e.g., In re Worldcom*, 2005 WL 2319118 at *1 fn.3, *13 fn.23 (S.D.N.Y. 2005) (two late objections addressed); *In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 457 fn.10 (S.D.N.Y. 2004) (six late objections considered without deciding whether untimeliness excusable). It was an abuse of discretion for a court with a fiduciary duty to absent class members to disregard a meritorious objection when the objection was in practice presented in good time, and the procedural defect was entirely due to a deliberate stratagem of the defendants.

UBS notes that D'Aria also submitted a consent to join the action, Resp. Br. 3 and 9, but this has no bearing on his right to object to (or intervene in) the proposed settlement. Unlike a Rule 23 class action from which class members have the right to "opt out", the collective action procedure established by the Fair Labor Standards Act, 29 U.S.C. § 216, requires participants to affirmatively "opt in". In the settlement context, therefore, a form of consent to join the collective action serves a similar purpose as a claim form in a conventional class action. Indeed, the settlement notice sent to class members in this action (which is both a collective action and a Rule 23 class action) expressly contemplates that objectors may also submit consents to join in order to assure their participation in the final settlement. *See* Reply App. C (excerpt of settlement notice).

CONCLUSION

For the foregoing reasons, D'Aria's petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECLARATION OF KENNETH K. LEHN DATED DECEMBER 15, 2006

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-06-04068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. et al.,

Defendants.

DECLARATION OF KENNETH K. LEHN IN SUPPORT OF ANTHONY D'ARIA'S MOTION TO INTERVENE

Appendix A

Date: January 19, 2007
Time: 9:00 a.m.
Ctrm: 7
Judge: Hon. Maxine M. Chesney

I, Kenneth K. Lehn, declare as follows:

1. I am an attorney licensed to practice in the State of New Jersey and a principal in the law firm of Winne, Banta, Hetherington, Basralian & Kahn, P.C., located in Hackensack, New Jersey. I am counsel to Lawrence R. Kaufmann concerning wage and hour actions against his former employers. Except where otherwise indicated, I have personal knowledge of the facts stated in this declaration, and if called upon to do so could and would competently testify to them.

2. In a telephone conversation on November 15, 2006, Mr. Kaufmann told me that UBS had contacted other counsel he retained in New Jersey (Mahr and Mahr, L.L.C.) about Mr. Kaufmann's indebtedness of $102,000 to UBS within days after his litigation counsel, Lovell Stewart Halebian LLP, filed Mr. Kaufmann's objections to the proposed settlement in *Bowman et al. v. UBS Financial Services, Inc.*, Case No. C-04-03525 MMC (*Bowman* docket no. 81).

3. On earlier occasions in October and November, 2006, when Mr. Kaufmann and I discussed issues regarding both the *Bowman* and *Glass* actions against UBS and other claims by him against other brokerage firms, he never disclosed to me that he was secretly

negotiating with or had reached a deal with UBS to withdraw his objections and motions in *Bowman* and in *Glass*.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration was executed at East Orange, New Jersey, on December 15, 2006.

/s/
KENNETH K. LEHN

Signature attestation: I hereby attest that I have on file the holograph signature for the conformed signature indicated above by /s/ in this e-filed document.

/s/
JOHN HALEBIAN

APPENDIX B — NOTICE OF LAWRENCE R. KAUFMANN'S WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF DATED NOVEMBER 14, 2006

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE NO. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

Appendix B

CASE NO. C-06-04068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

NOTICE OF LAWRENCE R. KAUFMANN'S WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF

Date:	November 17, 2006
Time:	9:00 a.m.
Courtroom:	7
Judge:	Hon. Maxine M. Chesney

TO THE COURT AND ALL INTERESTED PARTIES:

Appendix B

PLEASE TAKE NOTICE THAT Lawrence R. Kaufmann ("Kaufmann") has withdrawn (1) his "Objection to the Proposed Settlement and Intention to Appear at the Settlement Hearing" in *Bowman v. UBS Financial Services, Inc. ("Bowman")* (C-04-03525 MMC) (Docket No. 81) and (2) his "Motion to Intervene, For Consolidation And For Other Relief" (Docket No. 83) in *Bowman* (Docket No. 83) and in *Glass v. UBS Financial Services, Inc.* ("*Glass*") (C-06-04068 MMC) (Docket No. 37) that he previously filed before this Court. The circumstances surrounding Kaufmann's withdrawal of such motions are provided in the attached documents (marked Exhibits A through C): (1) Letter from Kaufmann's attorney, George L. Mahr III, notifying the Court that Kaufmann has withdrawn these motions, (2) Kaufmann Declaration, and (3) Declaration of Vincent P. Browne.

DATED: November 14, 2006

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: /s/
M. KIRBY C. WILCOX

Attorneys for Defendant
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Appendix B

EXHIBIT A

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November 13, 2006

VIA UPS NEXT DAY DELIVERY

Judge Maxine Chesney
United States District Court
Northern District of California
450 Golden Gate Avenue, Dept. 7
San Francisco, CA 94102

Re: Notice of Withdrawn (1) "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" in *Bowman v. UBS Financial Services, Inc.* ("*Bowman*") (C-04-03525 MMC) and (2) "Motion to Intervene, for Consolidation and for Other Relief" in *Bowman* and *Glass v. UBS Financial Services, Inc.* ("*Glass*") (C-06-04068 MMC)

Appendix B

Dear Judge Chesney:

Please be advised that I represent Lawrence R. Kaufmann, a former employee of UBS Financial Services, Inc. I write to you to notify you of my client's decision to *with* the following:

(1) His "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" (Docket No. 81) in *Bowman* and

(2) His "Motion to Intervene, for Consolidation and for Other Relief" in *Bowman* (Docket No. 83) and *Glass* (Docket No. 37) that he previously filed before this Court.

In summary, on December 13, 2001, UBS Financial Services Inc., ("UBSFS") loaned Mr. Kaufmann a significant sum of money, which UBSFS agreed to forgive over a number of years of services performed by Mr. Kaufmann. His employment ended before the lapse of that time period. UBSFS has demanded repayment of the balance of this loan.

In settlement of their differences, Mr. Kaufmann proposed, through me, that if UBSFS forgave the entire outstanding loan balance, Mr. Kaufmann would agree to the following:

Accordingly, the Court finds "the reason for and length of the delay" in seeking intervention weighs against a finding of timeliness.

d. Conclusion

For the reasons set forth above, the Court finds D'Aria's motion to intervene is untimely and, consequently, that D'Aria has not shown he is entitled to intervene as a matter of right. *See Alisal*, 370 F.3d at 919 (holding "party seeking to intervene bears the burden of showing that *all* the requirements for intervention have been met") (emphasis in original).

4. Adequacy of Representation

Although D'Aria's motion for intervention as a matter of right fails because he has not demonstrated such motion is timely, the Court nonetheless will continue its analysis of the four-factor test.

The fourth and final factor is whether "the existing parties may not adequately represent the applicant's interest." *See Alisal*, 370 F.3d at 919. In determining adequacy of representation, the Court considers three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

Appendix C

"The most important factor in determining the adequacy of representation is how the interest compares with the interest of existing parties." *Id.* "When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.* "If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." *Id.*

Here, D'Aria and the named *Glass* plaintiffs have the same ultimate objective: obtaining compensation for assertedly unpaid overtime and improper wage deductions. Indeed, D'Aria, in his proposed complaint-in-intervention, expressly adopts "all of the allegations of plaintiffs' complaint in this action except those that relate to the adequacy of the putative class representatives," and alleges no additional substantive causes of action against defendants. (*See* Proposed Complaint in Intervention ¶ 3.) Thus, D'Aria must make a "compelling showing" of inadequate representation. *See Arakaki*, 324 F.3d at 1086; *see also League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir.1997) ("When a proposed intervenor has not alleged any substantive disagreement between it and the existing parties to the suit, and instead has vested its claim for intervention entirely upon a disagreement over litigation strategy or legal tactics, courts have been hesitant to accord the applicant full-party status.").

D'Aria argues class counsel is inadequate for the following reasons: (1) the dollar amount of the settlement

is too low compared to the actual damages suffered by the class; (2) each class member in the instant action will receive significantly less than the recovery per class member in *Bowman;* (3) the instant action was settled without any formal discovery, expert analysis, or other formal litigation activity; (4) the attorneys' fees negotiated are too high compared to the time and effort expended; (5) the settlement was negotiated as a "claims made" settlement under which all unclaimed settlement funds and any portion of the claimed attorneys' fees that are not approved by the Court will revert to UBS; and (6) proper notice was not provided to the class. (*See* Motion at 2-3.) In essence, D'Aria complains that the amount of the settlement is too small, the amount of attorneys' fees sought is too large, and the circulation of the notice was too narrow.

In asserting the amount of the settlement is inadequate, D'Aria sets forth no analysis with respect to the likelihood of success on the merits of the class claims if such claims were tried rather than settled. *See, e.g., Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir.1998) (providing district court must consider, *inter alia,* "the strength of the plaintiffs' case" in determining whether a settlement is fair, reasonable, and adequate). Although D'Aria contends the *Glass* plaintiffs suffered between $240 million and $880 million in unpaid overtime,[2] he provides no analysis of the

2. The parties estimate the losses at approximately $128 million to $180 million. (*See* New York Attorney General Decl. Ex. 1 (Transcript of Aug. 11, 2006 preliminary approval hearing) at 13:1-14:5.)

applicability to the class members of the FLSA's administrative exemption. As discussed above, the Department of Labor recently issued an Opinion Letter stating the administrative exemption applies to stockbrokers and, consequently, that stockbrokers are not entitled to overtime pay under the FLSA. Because the reasonableness of the settlement depends not only on the claimed amount of damages, but also on a showing of the strength of the plaintiffs' case, and D'Aria fails to provide any analysis on the latter point, his computation of damages fails to provide adequate support for a finding that the amount of the settlement is inadequate.[3]

D'Aria's next contention is that the amount of the settlement is too low when compared with the settlement in *Bowman*. There is no evidence, however, that the *Bowman* and *Glass* settlements constitute parts of a single settlement, let alone a single settlement pursuant to which settlements funds were allocated to the *Bowman* class at the expense of the *Glass* class members. As the Court noted at the *Bowman* fairness hearing, the *Bowman* action was settled prior to the filing of any of the actions that ultimately were consolidated in the *Glass* action, and the amount of the

3. D'Aria's contention that plaintiffs' counsel did too little to prepare for settlement negotiations adds no further support in the absence of a showing that the settlement amount is inadequate. Consequently, the Court denies as moot defendants' motion, filed January 11, 2007, to strike the supplemental declaration of John Halebian as conclusory, in that the opinions challenged thereby concern the subject of adequate preparation.

Bowman settlement was unaffected in any way by the later settlement negotiations in the *Glass* action. (*See* McInerney Decl. Ex. 3 (Transcript of Nov. 17, 2006 *Bowman* fairness hearing) at 12:6-24.)

Moreover, D'Aria fails to set forth any independent analysis of the *Glass* class members' likelihood of success on the merits of their claims as compared to that of the *Bowman* plaintiffs. Rather, D'Aria relies entirely on the analysis set forth in the amicus brief submitted by the Attorney General of the State of New York, in which the Attorney General compared the California law applicable to the *Bowman* plaintiffs with the New York law applicable to the New York class members in the instant action. When UBS filed a detailed response to the amicus brief, explaining the differences between the two states' laws, the Attorney General filed a reply conceding California's overtime laws are significantly more favorable to plaintiffs than New York's overtime laws. D'Aria presents no argument to the contrary.

In arguing the amount of attorneys' fees negotiated reflects inadequate representation, D'Aria fails to recognize that the Ninth Circuit has held 25% of the gross settlement amount to be the benchmark for attorneys' fees awarded under the percentage method. *See, e.g., Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000). Here, the settlement provides for a maximum fee of $11,250,000, which is 25% of the $45 million settlement amount. (*See* Amended Joint Stipulation of Settlement ¶ 29(a).) Moreover, the Ninth Circuit has held that where, as here, the settlement provides that

unclaimed settlement funds revert to the defendant, the district court must award fees as a percentage of the entire fund, or pursuant to the lodestar method, not on the basis of the amount of the fund actually claimed by the class. *See Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Consequently, D'Aria has failed to show counsel's claim for a 25% fee award indicates either some impropriety or inadequacy in counsel's representation.[4]

The Court likewise finds unpersuasive D'Aria's contention that plaintiffs' counsel inadequately represented the class by agreeing to a settlement under which any unclaimed settlement funds, or the amount by which attorneys' fees are reduced, will revert to UBS. D'Aria cites no authority holding improper a settlement providing for such reversion of unclaimed or unawarded funds; indeed, there is authority suggesting to the contrary. *See, e.g., Williams*, 129 F.3d at 1027 (discussing class action settlement without expressing concern as to provision for reversion of unclaimed funds to defendant); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 816 (5th Cir. 1989) (approving settlement containing provision that unclaimed funds under consent decree would be divided between plaintiffs' counsel and defendant); Herbert Newberg & Alba Conte, 3 Newberg on Class Actions §§ 10:15, 10:17 (4th ed.2002) (citing cases).[5]

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4. The Court, of course, ultimately will determine whether the amount claimed should be awarded.

5. *See also Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (holding unclaimed (Cont'd)

Finally, with respect to notice, D'Aria argues that plaintiffs' counsel "failed to give proper notice to the class by misrepresenting the nature and amount of the proposed settlement, limiting actual notice solely to the last known address of class members, and failing to publish any notice in a widely circulated financial publication likely to be seen by class members." (*See* Motion to Intervene at 3:19-22.) D'Aria does not identify the asserted misrepresentations, and the Court is aware of none. Nor does D'Aria submit evidence supporting his assertion as to the use of addresses. By contrast, plaintiffs' counsel attests "notice was not limited to the last known address of class members; instead, the claims administrator did address updated searches and re-mails." (*See* McInerney Decl. ¶ 14; *see also* Holland Decl. ¶¶ 8-9.) Finally, plaintiffs' counsel attests he "took out a full page advertisement in the Registered Rep," which, he further attests, is a "monthly national publication subscribed to by a large number of brokerage houses, branches and brokers themselves." (*See id.* ¶ 15 and Ex. 10.) D'Aria submits no evidence to the contrary. Consequently, D'Aria has not shown the notice provided to the class was inadequate.

(Cont'd)
amount of class action *judgment* against defendant may be returned to defendant "when deterrence is not a goal of the statute or is not required by the circumstances"); *In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 721, 37 Cal.Rptr.3d 660 (2006) (noting, under California law, "a court approved settlement could properly include a 'reversion of . . . funds to the defendant,' such as the one-third reversion" of unclaimed settlement funds provided for in settlement therein) (citation omitted; ellipsis in original).

In sum, D'Aria has failed to demonstrate he "would offer any necessary elements to the proceeding that other parties would neglect." *See Arakaki*, 324 F.3d at 1086.

Accordingly, for the reasons set forth above, D'Aria has not shown, let alone made a "compelling showing" of, *see Arakaki*, 324 F.3d at 1086, inadequate representation. Consequently, even if his motion to intervene had been timely, said motion, for this additional reason, will be denied.[6]

CONCLUSION

For the reasons set forth above, D'Aria's motion to intervene in the instant action is hereby DENIED.

This order terminates Docket No. 130.

IT IS SO ORDERED.

Dated: January 17, 2007

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

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6. In light of this ruling, the Court does not reach plaintiffs' argument that D'Aria's counsel engaged in unethical conduct by criticizing the manner in which Kaufmann, his former client, withdrew his motion to intervene in the instant action.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED NOVEMBER 16, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. C-04-3525 MMC

JEFF BOWMAN, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC.,

Defendant.

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

Appendix D

ORDER DENYING ANTHONY DARIA'S MOTION TO JOIN OR BE SUBSTITUTED FOR LAWRENCE R. KAUFMANN AS (1) OBJECTOR TO PROPOSED SETTLEMENT AND (2) MOVANT AND INTERVENOR-PLAINTIFF IN MOTION TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF

Before the Court is "Anthony Daria's Motion To Join Or Be Substituted For Lawrence R. Kaufmann As (1) Objector To Proposed Settlement And (2) Movant And Intervenor-Plaintiff In Motion To Intervene, For Consolidation, & For Other Relief," filed November 16, 2006.

In a letter and declaration filed November 15, 2006, Kaufman withdrew his objection to the proposed settlement in *Bowman*. By separate order filed concurrently herewith, the Court has found approval for such withdrawal is not necessary, as Kaufmann is not a member of the *Bowman* class and thus lacks standing to assert any objection to the *Bowman* settlement. Daria cites no authority permitting him to join or substitute in another person's objection and thus avoid any argument that Daria's objection is untimely, much less any authority permitting him to join or substitute himself in place of a person who has withdrawn an objection. Moreover, Daria, like Kaufmann, is not a member of the *Bowman* class and, thus, lacks standing to object to the proposed *Bowman*

settlement.[1] Accordingly, Daria's motion to join in Kaufmann's withdrawn objection, or to substitute himself in place of Kaufmann for purposes of asserting Kaufmann's withdrawn objection, is hereby DENIED.

By the instant motion, Daria further seeks to join or substitute as the movant in Kaufmann's withdrawn motions to intervene in the *Bowman* and *Glass* actions. Daria cites no authority permitting him to join or substitute himself as the movant for purposes of asserting another person's motion to intervene. Moreover, because Kaufmann has withdrawn his motions to intervene, there are no motions pending in which Daria can "join" or "substitute." Accordingly, Daria's motion to join in Kaufmann's motions to intervene, or to substitute himself in place of Kaufmann for purposes of making such motions, is hereby DENIED.

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1. The *Bowman* action is asserted on behalf of a class consisting of all persons who, between June 30, 2000 and the present, worked for UBS as a Financial Advisor or Financial Advisor Trainee in California. (*See* Second Amended Complaint ("SAC") ¶ 6.) Daria's counsel attests Daria was employed by UBS as a broker in New York. (*See* Halebian Decl. ¶ 2.) "The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals." *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989). Consequently, "nonclass members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement." *See id.*; *see also San Francisco NAACP v. San Francisco Unified School District*, 59 F. Supp. 2d 1021, 1032 (N.D. Cal. 1999) (holding "nonclass members have no standing to object to the settlement of a class action").

Appendix D

This order terminates Docket No. 136 in Case No. 04-3525 and Docket No. 86 in Case No. 06-4068.

IT IS SO ORDERED.

Dated: November 16, 2006

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING FILED MAY 18, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15278

D.C. No. CV-06-04068-MMC
Northern District of California, San Francisco

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor - Appellant.

Appendix E

No. 07-15309

D.C. No. CV-06-04068-MMC
Northern District of California, San Francisco

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs,

and

MARTY EVANS,

Plaintiff - Appellant,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor.

Appendix E

ORDER

Before: FARRIS, NOONAN and McKEOWN, Circuit Judges.

The panel has issued an amended memorandum disposition. Accordingly, the petitions for rehearing are DENIED.

The full court has been advised of the Petitions for Rehearing En Banc and no judge of the court has requested a vote on the Petitions for Rehearing En Banc. Fed. R. App. P. 35. Appellants' Petitions for Rehearing En Banc are DENIED.

No further petitions for rehearing and petitions for rehearing en banc will be entertained.